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In the Supreme Court of the United States

OCTOBER TERM, 1974

CHARLES LOWE SNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the indictment is defective, that documentary evidence used to prove an element of the offense was not probative, and that the Gun Control Act of 1968 unconstitutionally discriminates against persons under indictment.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on thirteen counts of violating 18 U.S.C. 922(a)(6) by stating on Internal Revenue Service Form 4473 Part I, "Firearms Transaction Record," that he was not under indictment for a crime punishable by imprisonment for a term exceeding one year, knowing such statements to be false, in connection with the purchase from a federally-licensed dealer of one shotgun and fourteen pistols on thirteen occasions between December 22, 1971, and May 8, 1972. Petitioner was sentenced to four years'

imprisonment on each count. The sentences on the first seven counts were to run concurrently with one another, and the sentences on the last six counts were to run concurrently with one another, but consecutively to the sentences on the first seven counts. Petitioner thus was given a total of eight years' imprisonment, subject to immediate parole eligibility under 18 U.S.C. 924(a). The court of appeals affirmed (Pet. App. A; 508 F.2d 21).

1. The undisputed evidence established that petitioner, who was at the time under indictment in Texas for offenses carrying penalties of imprisonment in excess of one year, purchased from the Oshman Sporting Goods Company, at two different locations, fifteen weapons on thirteen separate occasions between December 22, 1971 and May 8, 1972. In connection with each purchase, petitioner executed and signed a Firearms Transaction Record, Form 4473, on which he falsely stated that he was not under indictment for a crime punishable by imprisonment for more than one year. Oshman Sporting Goods' status as a federally-licensed dealer at the time of the offenses was established by documentary evidence.

2. Petitioner contends (Pet. 5-6) that the indictment, which charged in each count that on a certain date petitioner falsely stated that "he had not been indicted" for a crime, is defective because the actual false statement was his negative response to the question, "Are you under indictment * * *?" Petitioner claims that under the wording of the indictment, the jury could have convicted him even if the Texas indictments had been dismissed at the time he purchased the firearms. Petitioner did not contend, however, that the Texas indictments had been dismissed.[1] Rather, he testified that at the time of the purchases he *believed* they had been dismissed.

[1]The evidence established that in fact the Texas indictments were pending at the time of the offenses involved here. Thus, the danger that the wording of the indictment would permit conviction where indictments had been dismissed, is not present in this case.

Petitioner's belief was relevant to whether his statements were knowingly false, as required by 18 U.S.C. 922(a)(6) and the language of the indictment, and if the jury had believed his testimony, it would have acquitted him on the ground that his statements, although false were not knowingly made. The language of the indictment would not have been a bar to his acquittal on such a ground. Any discrepancy between the language of the indictment and the false statement on the Firearms Transaction Records was, as the court of appeals held (Pet. App. A A-3), a "semantic difficult[y] of no legal consequence.[2]

3. Petitioner contends that the evidence that the false statements were made to a licensed dealer did not prove that the dealer was licensed when the purchases were made.

Rule 44, Fed. R. Civ. P. (which applies in criminal cases, see Rule 27, Fed. R. Crim. P.), provides that an official record may be proved by "a copy attested by the officer having the legal custody of the record * * * and accompanied by a certificate that such officer has the custody." The certificate may be made by "any public officer having a seal of office and having official duties in the district * * * in which the record is kept, authenticated by the seal of his office." Government exhibits 3

[2]Petitioner raises (Pet. 2-3), but does not argue, the question whether the indictment charged an offense and adequately apprised him of the nature of the charges. This contention was rejected by the court of appeals (Pet. App. A A-3), which correctly held that the indictment was sufficient to charge a violation of 18 U.S.C. 922(a)(6) and to apprise petitioner of the nature of the charges.

and 4, which established[3] that Oshman's was a licensed dealer at the time of the purchases, complied with Rule 44. Billy L. Gaunt, Regional Director of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, certified, under the seal of the Treasury Department, that Geneva N. Schlinke, Supervisor, Firearms and Explosives Licensing Section, had custody and control of official records and documents pertaining to firearms licenses in the Southwest Region (which includes Texas). Geneva N. Schlinke attested that the copies of the Oshman licenses introduced as part of government exhibits 3 and 4 were true copies of the documents retained by the bureau and that Oshman's was licensed at both locations at the time petitioner purchased the firearms.

Petitioner claims that this evidence was not probative because the copies of the licenses bear the heading "Application for Renewal of License" and because they do not indicate the effective date of the license but only the expiration date.

The copies of the licenses contained in the exhibits are actual copies of the Oshman licenses. A federal dealer's license is the original and first page of a multi-carbon-copy form.[4] When the license is issued, the name of the licensee, the license number, and the expiration date are

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[3]Petitioner purchased firearms at two Oshman locations in Houston, 902 Main Street and 5208 Palms Center. Government exhibits 3 and 4 were identical, except that the former related to the Main Street location and the latter to the Palms Center location.

[4]For purposes of illustration, we are lodging with the Clerk of this Court a blank dealer's license form of the edition in use at the time petitioner purchased the firearms in late 1971 to mid-1972.

simultaneously typed in the license and several copies. The third copy of the license is denominated a renewal form, and is retained by the Bureau of Alcohol, Tobacco and Firearms until about two months prior to expiration of the current license, when it is mailed to the licensee for execution and remission of the renewal fee (see 26 C.F.R. 178.45). After return of the renewal application and fee, the regional office copy of the prior license is destroyed, the executed renewal application retained, and a new license issued. Therefore, the attestations of the custodian of the records that the documents were copies of the Oshman licenses were correct.

The licenses indicate expiration dates of October 11 and October 21, 1972. Since licenses are issued for a period of no less than one year, 18 U.S.C. 923(a)(3)(C), 26 C.F.R. 178.49, the licenses were, as the custodian of records attested, in effect during the period from December, 1971, to May, 1972, when petitioner purchased the firearms.

4. Petitioner contends that the Gun Control Act of 1968 unconstitutionally discriminates against persons under indictment. Whether penal statutory classifications violate the due process clause of the Fifth Amendment depends on whether the classifications are reasonable in light of the legislative purpose. The court of appeals correctly held (Pet. App. A A-5) that the classifications challenged by petitioner are constitutionally valid.

a. The fact that convicted persons may apply to the Secretary of the Treasury for relief from the statutory disabilities (18 U.S.C. 925(c)), while similar grace provisions are not available to persons under indictment, does not offend due process. In contrast to conviction, indictment is only a temporary bar to the purchase of

firearms. Congress could reasonably limit the provision for relief to conviction, which would otherwise be a permanent prohibition.

b. Petitioner derives no support from the fact that a licensed dealer under indictment may continue operation of his business during the pendency of the indictment (18 U.S.C. 925(b)). As the court of appeals concluded (Pet. App. A A-6), it was reasonable for Congress to ameliorate the potentially devasting effects that an indictment could have on a dealer's livelihood. No such consequences flow from the statutory bar applicable to unlicensed persons under indictment, such as petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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